

Calculating Council's 60 Day Statutory Timeframe

Introduction

One of the most common complaints from planning permit applicants is the length of time taken by Councils to determine planning applications. Councils have a statutory requirement to decide upon planning permit applications within 60 days. In reality, the time taken to determine a planning permit application is often far greater, with a current state-wide average for buildings and works applications, close to 210 days. Most municipalities report that less than 60% of their applications are being processed in the requisite timeframe, even though these statistics are skewed in Councils' favour by the large number of very simple signage, fencing, vegetation removal, amendment and other applications which are capable of being processed very quickly.

As a planning permit applicant, you have the right under Section 79 of the Planning and Environment Act (the Act) to lodge an appeal with VCAT if Council fails to determine your application within the statutory timeframe. Used appropriately, a VCAT appeal under Section 79 can expedite the planning process and circumnavigate many of the issues that commonly delay Council decisions.

However, calculating the 60 day timeframe is not as simple as it might seem. This article provides guidance for calculating Council's 60 day timeframe, dispels common misconceptions relating to that calculation and provides useful insight into the rights and obligations of applicants and Council, alike.

It is beyond the scope of a single article to discuss all possible events that could affect the 60 day calculation. As always, we recommend you seek professional advice to match your specific circumstances.

Contents

Introduction.....	1
Contents	2
The Rules for Calculating the 60 Day Timeframe	3
Milestones that Stop, Start and Reset the Clock	3
Milestone 1: Lodgement of Permit Application.....	5
Misconceptions and important considerations	5
Milestone 2: Further Information Requested.....	6
Misconceptions and important considerations	6
Milestone 3: Further Information Provided.....	7
Misconceptions and important considerations	7
Milestone 4: Notice of Application Required	8
Misconceptions and important considerations	8
Milestone 5: Last Notice of Application Given.....	8
Misconceptions and important considerations	9
Milestone 6: Formally Amending an Application	10
Misconceptions and important considerations	10
Milestone 7: VCAT Application or Council Decision	11
Misconceptions and important considerations	11
60 Day Calculation Table	12
A Note Regarding VicSmart Applications	13
10 Day Calculation Table	14
VCAT Appeals.....	15
Conclusion.....	15

The Rules for Calculating the 60 Day Timeframe

There are two important documents that combine to form the general rulebook of planning; the *Planning and Environment Act 1987* (the Act) and the *Planning and Environment Regulations 2005* (the Regulations). Together these two documents set down the powers and obligations of parties and authorities involved in the planning process and, importantly for this article, the statutory timeframes associated with determining planning permit applications.

For the purposes of this article we will use a hypothetical *statutory clock* to illustrate how the 60 day timeframe is calculated. The provisions of the Act and the Regulations set down a number of triggers that can start, stop and reset the statutory clock. Understanding these triggers is the key to understanding the 60 day calculation.

Milestones that Stop, Start and Reset the Clock

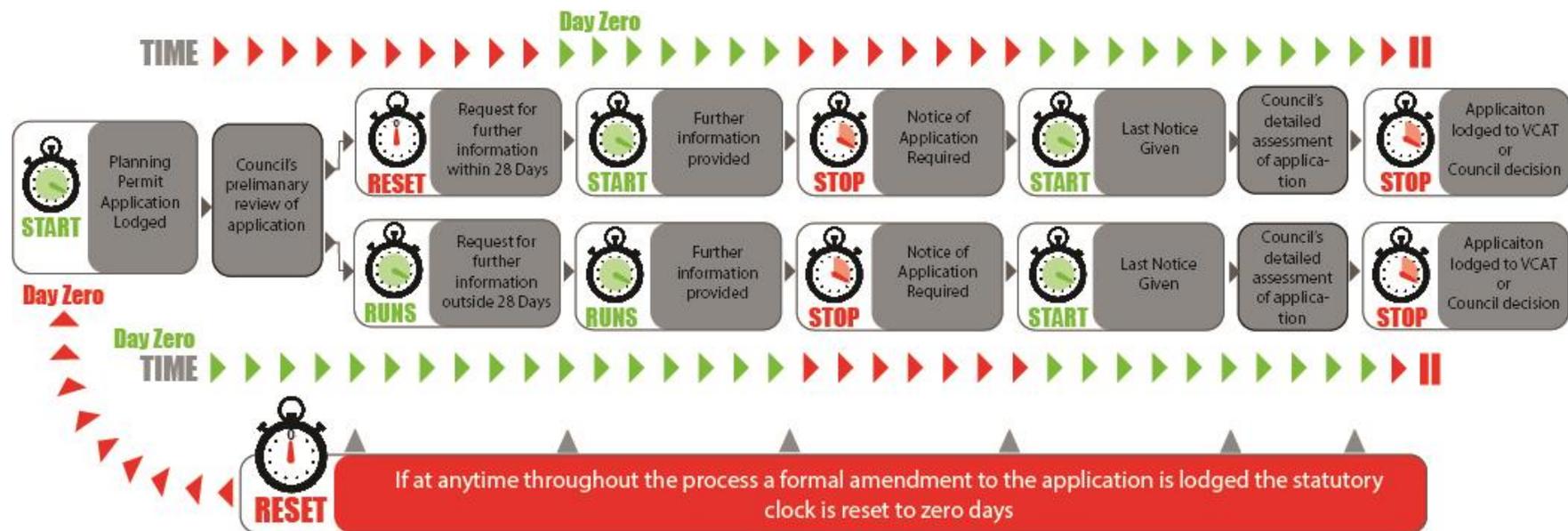
For the purposes of calculating the 60 day timeframe, the following milestones will start, stop or reset the statutory clock:

- 1) Lodging your permit application with Council
- 2) Council requesting further information
- 3) Provision of further information
- 4) Council directing that public notification/advertising be given
- 5) The giving of the last required notice/advertisement
- 6) Formally amending the application
- 7) Lodging an Application for Review with VCAT or Council's decision

The following diagram illustrates each of the important milestones and the influence each will have on the operation of the 60 day statutory clock through the application process:

Figure 1: Simplified processing procedure & statutory clock milestones

The following diagram shows a simplified, chronological processing procedure including milestones that start, stop and reset the statutory clock.



Milestone 1: Lodgement of Permit Application

For our purposes, the important date is the date that the application is received by Council. This triggers the statutory clock to start ticking from this date. Council has 60 statutory days from this date to determine your application.

Misconceptions and important considerations

The time requirement is not a straight 60 days from this date. Numerous other triggers can start, stop and reset the clock throughout the process.

Many permit applicants believe that the date the application is submitted is the date the application was *posted*, or the date of Council's acknowledgement letter. This is not the case. The application is considered *lodged* when Council can confirm it is in receipt of the application i.e. *the date Council receives the application*.

In *{ML Design v Boroondara(2005) VCAT 2088}* Helen Gibson (Deputy President of VCAT) concluded that it is the *completed application form* itself and *fee* that constitutes the application and that even if other information is not submitted with the application form, this does not mean that the *application* was not received. Such information can be requested via a further information request, at a later date.

Recently a number of Councils have changed their protocols and simply do not receipt applications that they deem to be incomplete. This could include an application that is not accompanied by a certificate of title, a CD copy of the plans, an arborists report or other material. While Council can reasonably require some (or all) of this information to determine an application, Council's refusal to receipt the application until it is supplied, is in our opinion, inappropriate and unlawful.

The ability for Councils to request further information (RFI) is mandated under Section 54 of the Act. The Act sets out what can be requested, the timeframe obligations of Council and the applicant's right of appeal to the Tribunal if unwarranted RFI material is sought by Council. Section 54 is the mechanism via which Councils should seek additional information, that is reasonably required, to assess applications.

Section 79 the Act provides the applicant a right of appeal to VCAT if Council takes longer than the statutory timeframe to determine the application.

Applicants should be aware that the date the application is lodged and the date of Council's further information request letter (discussed following) are the two dates that potentially have the greatest effect on the 60 day calculation. We recommend the use of electronic lodgement or registered post to ensure you can accurately confirm when your application was received by Council.

Milestone 2: Further Information Requested

The critical date for this trigger is the date that the letter from Council requesting further information is dispatched.

The further information request from Council may or may not trigger the statutory clock to stop ticking depending on the date the request is made.

- 1) If further information is requested within 28 days of the application being lodged, then the statutory clock resets to zero and does not restart until all requested information has been supplied to Council.
- 2) If further information is requested after 28 days from the initial lodgement date then the statutory time clock continues to tick (and is not reset).

Misconceptions and important considerations

The critical date here is the date that the request for further information is dispatched by Council– not the date that letter is received by the applicant.

On the odd-occasion correspondence from Council has been known to arrive 3-10 days later than the date printed on the correspondence. In such circumstances, we recommend applicants notify Council of the discrepancy and retain the accompanying envelope, which will include a date stamp from Australia Post for your records.

Sometimes a second request from Council will be received asking for even more information. These additional requests generally fall into two categories:

- I. Follow Up: If the information requested in the first letter was not adequately supplied Council may ask for clarification and/or reiterate their original request for the information.

In such instances the statutory clock will continue to tick until such time the information is supplied.

Alternatively, in the instances where the information is ultimately determined to not be required, the clock restarts from the date that the earlier information was supplied to Council.

- II. New Request: If Council requests *new* information in the second request and the request is received outside the 28 day timeframe, which it most likely will be, then the statutory clock does not stop as a result of this second request and will generally continue to run.

Milestone 3: Further Information Provided

The critical date here is the day satisfactory information is received by Council in response to the further information request. If the request for further information was issued by Council inside the 28 days (discussed above) the statutory clock recommences ticking, from day zero, on the date all the required information is received.

Misconceptions and important considerations

The relevant dates here is the date the information is received by Council, not the date it was sent.

We recommend contacting Council a few days after the response to the RFI is submitted to verify that the information supplied has been received, reviewed and is considered satisfactory.

As mentioned in the previous section, the statutory clock will not recommence ticking if the information provided is not deemed sufficient or

satisfactory by the Responsible Authority. In such instances Council will generally renotify you in writing of the information that is considered to be outstanding.

It is not uncommon for Councils to request information that applicants consider irrelevant or unnecessary. The information *required* as part of your planning permit application is generally documented in the relevant provisions of the planning scheme. These provisions are designed to ensure Council has sufficient information upon which to decide your application.

Applicants should be aware that it is possible to challenge the validity of Council's further information request at VCAT if you believe the request to be unreasonable.

Applicants should also be aware that applications can lapse if information is not provided to Council in accordance with any lapse date established under Section 54 of the Act. A lapsed application cannot be restarted and a new application will be required to be lodged.

Milestone 4: Notice of Application Required

The date of *Notice of Application Required* is the date that Council directs that public notification be given by post to affected parties, printed advertisements and/or the erection of a sign on site. The statutory clock stops on this date.

Misconceptions and important considerations

Once again, it is critical to note that the relevant date here is the date on which Council's request is dispatched – not the date that correspondence is received.

Milestone 5: Last Notice of Application Given

The critical date for this trigger is the date the last letter was posted, the sign was erected on site or the last notice was published in the newspaper, whichever date is the latter.

The statutory clock restarts on the date the last notice is given. For example, if notification takes place by way of letters to neighbours (generated and distributed by Council) and the erection of a sign on the site (carried out by the applicant), the date that the latter of these two activities occurs becomes the date of 'Last Notice of Application Given'.

Misconceptions and important considerations

A common misconception is that the clock cannot restart until after the sign has been placed on the subject site for 14 days. If the sign is erected on site after the letters and advertisement (if required) have been posted/published it is the date the sign is *erected* that is the trigger to restart the clock.

In *Groves v Moonee Valley (2005)*, former VCAT President, Justice Morris dispelled the misconception that the clock does not restart until 14 days after the sign has been erected. Thus, for the purposes of determining Council's 60 day timeframe the 14 days the sign is erected on the subject site can be included in the statutory calculation.

In order to verify that the applicant has carried out notification in accordance with Councils' instructions, many Councils will require that a Statutory Declaration be completed by the applicant or their agent. It is a common misconception that the Statutory Declaration acts as a clock trigger. The Statutory Declaration is not a trigger and bears no influence on the 60 day calculation.

That said, it is generally considered that the statutory declaration is a necessary step in the process. It ensures Council is aware that the applicant has completed their obligation to notify affected parties. In practice, Councils often do not re-commence work on applications until the statutory declaration is returned. It is our recommendation that applicants promptly return statutory declarations to minimise delays in the processing of their applications.

Milestone 6: Formally Amending an Application

It is important to note that formally requesting (or approving) an amendment to a planning permit application will reset the statutory clock to zero days, regardless of when in the process the amendment is made.

This means, an amendment to the planning permit application *form*, changes to the permit triggers or permit preamble, and in most instances, changes to the drawings, will reset the clock.

For example, if an application that was originally lodged for 10 apartments and a reduction in car parking was amended, after lodgement, into an application for 9 apartments the statutory clock would normally be reset to zero days at the time of the amendment.

Misconceptions and important considerations

Sections 50, 50A and 57A of the Act specify the requirements relating to amendments to an application:

- At request of the applicant before notice;
- By the responsible authority before notice;
- After notice of application is given;

Under these provisions a formal amendment to an application will reset the statutory clock to zero days. However, not all changes to an application will constitute a 'formal' amendment that reset the statutory clock to day zero.

Applicant's should carefully consider the impact of formally amending an application and spend as much effort as possible to ensure the application is lodged correctly the first time.

Milestone 7: VCAT Application or Council Decision

The clock stops for the last time on the day either of the following occurs:

- i. Council determines the application, or;
- ii. VCAT receives an Application for Review under Section 79 of the Act

Misconceptions and important considerations

The relevant date here is the date that the application is received by VCAT not the day it is sent. Any application to VCAT, against Council's failure to determine an application within the statutory time-frame, must be received before Council makes their decision.

For an appeal to be lodged with VCAT under Section 79 of the Act, the statutory timeframe must have elapsed between the date the original planning permit application, or formally amended, was lodged with Council and the date the Application for Review was received by VCAT.

60 Day Calculation Table

The Victorian Civil and Administrative Tribunal has created the following table to confirm whether the 60 day statutory timeframe has expired and an appeal against Council's failure to determine a planning application can be lodged.

Step 1	The date upon which the permit application was first received by the Responsible Authority.	
	The date upon which the permit applicant applied to amend the permit application.	
	The date upon which the permit applicant agreed to an amendment of the permit application.	
	The date upon which further information required within the prescribed time is given to the Responsible Authority.	
	Start date: the most recent of above dates	

Step 2	Start date	
	Date VCAT application received	
	Total days counted	

Step 3	Date notice requirement made	
	Date last notice given	
	Notice days counted	

Step 4	Total days counted in Step 2	
	Notice days counted in Step 3	
	Total days minus Notice days	

Extract from VCAT Planning and Environment List Guidelines:
Elapsed days in failure applications calculator. Four step process.

A Note Regarding VicSmart Applications

Readers will be aware that VicSmart permit applications substantially reduce the usual 60-day statutory timeframe (in which Council is required to determine applications) to just 10 statutory days, for certain classes of simple planning permit applications.

The processing of VicSmart applications and method of calculating the elapsed days is the same as the process depicted in Figure 1 and explained throughout this article, with the following exceptions:

1. The 28 day time-frame in which Council must seek further information in order to reset the clock as part of the 60 days calculation is reduce to 5 days (to seek further information) under a VicSmart application and;
2. No advertising is required under a VicSmart Application. Therefore no time can elapse between Council 'requiring the giving of notice' and 'the last notice being given'.

10 Day Calculation Table

Victorian Civil and Administrative Tribunal has created the following table to assist applicants in calculating whether the 10 day VicSmart timeframe has elapsed and an appeal against Council's failure to determine a planning application can be lodged.

Step 1	The date the permit application was first received by the Responsible Authority.	
	The date the permit applicant applied to amend the permit application.	
	The date the permit applicant agreed to an amendment of the permit application.	
	The date further information required within the prescribed time is given to the Responsible Authority.	
	Start date: the most recent of above dates	

Step 2	Start date	
	Date VCAT application received	
	Total days counted	

Step 3	Total days counted in Step 2	
	Number of non-business days between start date and date VCAT application received	
	Total days minus Notice days	

Extract from VCAT Planning and Environment List Guidelines:
Elapsed days in failure applications calculator. Three step process.

VCAT Appeals

If Council takes longer than the statutory timeframe to determine a planning permit application (60 days or 10 days depending on the application type), applicants can appeal to VCAT pursuant to Section 79 of the Act.

However, applicants should be aware that VCAT hearings can take 6 months, or more, to be listed. It is often quicker to continue to work with Council to garner an appropriate outcome.

Applicants contemplating appeals under Section 79 of the Act should also be aware that Section 115CA of the VCAT Act obligates Council to *reimburse the applicant the whole of any fees paid by the applicant in the proceeding*, unless Council can convince the Tribunal it would be unreasonable to do so.

Conclusion

The Act and Regulations discussed above encourage faster decisions to be made by Councils. It is important to note that as cases are tested by VCAT, the interpretation for the 60 day calculation may continue to change.

Permit applicants should be aware of their rights under:

- Section 79 of the Planning and Environment Act to appeal against Council's failure to determine an application within the prescribed time and;
- Section 78(b) of the Act to challenge a request for more information.

Understanding how, when and what triggers start, stop and reset the statutory clock can provide permit applicants with important leverage to expedite decisions.

Seek Professional Advice
Information contained in this publication should be considered as a reference only and is not a substitute for professional advice. Information contained in this publication may quickly become outdated. No liability will be accepted for any loss incurred as a result of relying on the information contained in this publication.
Seek professional advice relating to your specific circumstances.

Copyright
If you would like to reproduce or use for your own purposes any part of this publication, please contact enquiries@clause1.com.au for assistance.

Clause1 Pty Ltd
Phone: 03 9370 9599
Fax: 03 9370 9499

Email: enquiries@clause1.com.au
Web: www.clause1.com.au

Last updated 01.02.2017